Supreme Court, U.S.
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No. 97-1253

In The

Supreme Court of the United States

October Term, 1997

JANE DOE #102,

Petitioner,

v.

GEORGIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITIONER'S REPLY MEMORANDUM

JEFFREY O. BRAMLETT, ESQ.,
Counsel of Record

JOSHUA F. THORPE, ESQ.
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309
(404) 881-4100
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

10 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

I. BECAUSE THE GEORGIA SUPREME COURT DID NOT PASS ON THE APPLICABILITY OF *WILL V. MICHIGAN DEPARTMENT OF STATE POLICE*, 491 U.S. 58 (1989), TO THIS ACTION, THIS COURT MAY NOT REVIEW THAT ISSUE 1

II. THIS COURT SHOULD ALLOW THE GEORGIA COURTS TO PASS ON PETITIONER'S ARGUMENT THAT *WILL* DOES NOT PRECLUDE HER § 1983 CLAIM AGAINST RESPONDENT..... 3

III. RESPONDENT'S RELIANCE ON *WILSON V. GARCIA*, 471 U.S. 261 (1985), IS MISPLACED..... 5

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry, 449 U.S. 90 (1980) 3

Bailey v. Anderson, 326 U.S. 203 (1945) 2

Board of Regents v. Tomanio, 446 U.S. 478 (1980) 6

Cardinale v. Louisiana, 394 U.S. 437 (1969) 1, 3, 5

Crowell v. Randall, 10 Pet. 368, 9 L. Ed. 458 (1836) 2

Howlett v. Rose, 496 U.S. 356 (1990) 7

Illinois v. Gates, 462 U.S. 213 (1983) 3

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 6

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 2

State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154 (1945) 1

Webb v. Webb, 451 U.S. 493 (1981) 3, 5

Will v. Michigan Department of State Police, 491 U.S. 58 (1989) 1, 3, 4, 5

Wilson v. Garcia, 471 U.S. 261 (1985) 5, 6, 7

STATUTES

Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85 1

O.C.G.A. § 50-21-21(a) 4

O.C.G.A. § 50-21-23(a) 4

O.C.G.A. § 50-21-24 4

O.C.G.A. § 50-21-25(b) 4

O.C.G.A. § 50-21-27(b) 2, 6, 7

ARGUMENT

I. BECAUSE THE GEORGIA SUPREME COURT DID NOT PASS ON THE APPLICABILITY OF *WILL V. MICHIGAN DEPARTMENT OF STATE POLICE*, 491 U.S. 58 (1989), TO THIS ACTION, THIS COURT MAY NOT REVIEW THAT ISSUE.

Respondent attempts to avoid a grant of certiorari by arguing that petitioner's § 1983 claim against the Georgia Department of Corrections is barred by *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). Although the parties briefed this issue in the trial court, with petitioner contending that *Will* does not bar a § 1983 claim against a state agency when a State has made a legislative decision to strip that agency of sovereign immunity, (*see, infra*, at 3-5), *none of the lower courts passed on the issue*. The trial court expressly "deem[ed] it unnecessary to consider the issue of whether Defendant Department of Corrections is a person within the meaning of 42 U.S.C. § 1983." App., 9a. Neither the Georgia Court of Appeals nor the Georgia Supreme Court addressed the applicability of *Will* either expressly or by implication. App., 1a-6a.

Because the Georgia Supreme Court did not pass on the question of whether plaintiff's § 1983 claim is permissible under *Will*, this Court is precluded from doing so. *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945) ("Since the Wisconsin Supreme Court did not pass on the question, we may not do so."); *see Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (discussing "early established" authority holding that "the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and

decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' ") (*quoting Crowell v. Randall*, 10 Pet. 368, 391, 9 L. Ed. 458, 467 (1836)); *Bailey v. Anderson*, 326 U.S. 203, 207 (1945) (Supreme Court was "without jurisdiction" to review question not passed on below).

This Court's decision in *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940), is apposite:

> By virtue of the petition for certiorari addressed to the constitutional question which the state court decided, this Court has jurisdiction of the cause. And respondent, in urging decision here of the constitutional questions not pressed in the state court, relies on the familiar rule of appellate court procedure in Federal courts that, without a cross petition or appeal, a respondent or appellee may support the judgment in his favor upon grounds different from those upon which the court below rested its decision. **But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below.**

309 U.S. at 434 (emphasis supplied) (citations omitted).

Thus, this Court's review of the decision below is limited to the question of whether federal law requires application of O.C.G.A. § 50-21-27(b) to petitioner's § 1983 claim. The state trial court must be provided the opportunity to pass on the separate question of whether *Will* applies to petitioner's § 1983 claim.

II. THIS COURT SHOULD ALLOW THE GEORGIA COURTS TO PASS ON PETITIONER'S ARGUMENT THAT *WILL* DOES NOT PRECLUDE HER § 1983 CLAIM AGAINST RESPONDENT.

Even if this Court's rule prohibiting the resolution of questions not passed on by a state court were a prudential rather than a jurisdictional limitation, (*see Illinois v. Gates*, 462 U.S. 213, 218-22 (1983)), "there are sound reasons for" permitting the Georgia courts to pass on petitioner's argument that the Georgia Department of Corrections is a "person" for purposes of § 1983. *Cardinale*, 394 U.S at 439. Petitioner has advanced in the trial court a strong argument that when a State withdraws sovereign immunity from state agencies and consents to suits against such agencies – as Georgia has done in its Tort Claims Act – those agencies are suable "person[s]" under § 1983. This Court should permit the Georgia courts to pass on this argument, which turns to a large degree on the scope of the Georgia legislature's waiver of sovereign immunity, and to apply properly the decision in *Will*. *See Webb v. Webb*, 451 U.S. 493, 499 (1981) ("there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts"); *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (noting this Court's "expression of confidence in [the] ability" of state courts "to uphold federal law").

In *Will*, this Court held in a 5-4 decision that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." 491 U.S. at 71. The primary rationale for this decision was that the doctrine of sovereign immunity protects states from being sued without

their consent. *Id.* at 67. This Court noted that it "is an 'established principle of jurisprudence' that the sovereign cannot be sued in its own courts without its consent." *Id.* (citation omitted).

After *Will* was decided, the Georgia legislature enacted a Tort Claims Act pursuant to which it removed sovereign immunity from state agencies and consented to suits against such agencies. O.C.G.A. §§ 50-21-23(a), 50-21-25(b) (1994). Although the Act lists a number of claims for which state agencies will *not* be liable, section 1983 claims are not included on that list. O.C.G.A. § 50-21-24 (1994). Thus, the Georgia General Assembly made no attempt to exclude § 1983 claims from its waiver of sovereign immunity for state agencies. Under the rationale of *Will*, when a state withdraws the protection of sovereign immunity from and consents to suits against state agencies, those agencies become "person[s]" subject to § 1983 liability. *See Will*, 491 U.S. at 67 n.7 (municipalities are "persons" under § 1983 because they are not protected by sovereign immunity). The Tort Claims Act is an exercise of Georgia's authority to limit the scope of its sovereign immunity and to provide additional remedies for governmental misconduct by subjecting state agencies to § 1983 liability in Georgia courts. *See* O.C.G.A. § 50-21-21(a) (1994) (purpose of the Act is to redress "the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity").

This Court's jurisprudence establishes that the Georgia courts should have the first opportunity to pass on the foregoing argument:

> In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.

Webb, 493 U.S at 499. Moreover, because the trial court did not reach petitioner's argument, the record below provides an insufficient basis for this Court to pass on the applicability of *Will* to this action. *See Cardinale*, 394 U.S. at 439 ("the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind").[1]

III. RESPONDENT'S RELIANCE ON *WILSON V. GARCIA*, 471 U.S. 261 (1985), IS MISPLACED.

Respondent's sole argument addressed to the merits of this petition is that *Wilson v. Garcia*, 471 U.S. 261 (1985), dictates the application of O.C.G.A. § 9-3-33 to petitioner's § 1983 claim. This argument misses the point. As this Court noted in *Wilson*, "In virtually all statutes of

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[1] To the extent this Court deems it necessary or appropriate to review the applicability of *Will* to petitioner's § 1983 claim, petitioner respectfully requests that the Court grant certiorari on that question as well as the question raised in her petition so that she may have a full and fair opportunity to brief the *Will* issue.

limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." 471 U.S. at 269 n.17 (*quoting Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975)). *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), which *Wilson* cites and follows, establishes that state tolling rules are "binding rules of law" that *must* be applied to § 1983 claims unless those rules are inconsistent with federal law. *Tomanio*, 446 U.S. at 484-85; *see id.* at 486 (" ' "In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, **and exceptions thereto**, on the prosecution of a closely analogous claim." ' ") (emphasis supplied).

O.C.G.A. § 50-21-27(b) (1994) is a tolling rule that is consistent with federal law and thus must be applied to petitioner's § 1983 claim. The statute singles out tort claims accruing during a specific time period and provides litigants with, as respondent itself states, an "**extension of the two-year statute of limitations period.**" Brief of Respondent, p. 10 (emphasis supplied). "[E]xceptions to the statute of limitations are generally referred to as 'tolling' and, as more fully discussed in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), are an integral part of a complete limitations policy." *Tomanio*, 446 U.S at 488. Thus, under *Tomanio*, section 50-21-27(b) *is* a tolling rule, *is* part of Georgia's limitations policy for claims asserted under the Tort Claims Act and *must* be applied to petitioner's § 1983 claim. *Id.* at 485 (a court may "disregard an otherwise applicable state rule of law only if the state law is 'inconsistent with the Constitution and laws of the United States' ").

Moreover, respondent's argument concerning *Wilson* wholly ignores the antidiscrimination principle contained in the Supremacy Clause. Petition for Certiorari, pp. 17-22. If the Georgia Supreme Court may construe and apply § 50-21-27(b) so as to provide an extended limitations period for state law claims, but not for § 1983 claims, the State of Georgia will have discriminated against a federal cause of action in precisely the manner prohibited by *Howlett v. Rose*, 496 U.S. 356 (1990). Respondent's attempted reliance on *Wilson* is unavailing: *Tomanio* and the antidiscrimination principle of the Supremacy Clause require the application of § 50-21-27(b) to petitioner's § 1983 claim.[2]

Respectfully submitted,

JEFFREY O. BRAMLETT, ESQ.,
Counsel of Record

JOSHUA F. THORPE, ESQ.
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309
(404) 881-4100
Counsel for Petitioner

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[2] Indeed, *Wilson* itself relies on a "federal interest" in ensuring that limitations periods "not discriminate against the federal civil rights remedy" in § 1983. 471 U.S. at 276.